Parl Singh a/l Gurdial Singh v Wisma Perak Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEALS NO R1–12–20 OF 2003 AND R1–12–21 OF 2003

RAUS SHARIF J

11 APRIL 2005

Civil Procedure — Costs — Interlocutory proceedings — Whether costs calculated on a solicitor-client basis should be allowed — Subordinate Court Rules 1980 O 48 rr 21 & 28

Civil Procedure — Summary possession of land — Mesne profits — Whether must prove actual damage

The plaintiff was the registered proprietor of the premise. Under a written tenancy agreement between the parties, the defendant as the tenant covenanted to apply for and obtain at his costs the requisite approvals and licenses from the relevant authorities for the purpose of lawfully operating a car park at the premise. The plaintiff claimed the defendant had failed to obtain the required licence, and requested the defendant to stop operation of the car park and hand over possession of the premise to the plaintiff. The session judge granted summary judgment to the plaintiff and ordered the defendant to deliver vacant possession of the premise to the plaintiff. The sessions judge also ordered mesne profits and costs calculated on a solicitor-client basis. The defendant appealed.

Held, allowing the defendant's appeal with regards to mesne profits and costs on solicitor-client basis:

(1) The defendant had failed to obtain the required licence to operate the car park. Thus the defendant was in breach of the written agreement. The defendant had no defence to the plaintiff's claim of vacant possession of the premise (see para 6).

(2) The session judge did not order the plaintiff to prove actual damages which the plaintiff alleged to have suffered as a result of the breach by the defendant. For this reason, that part of the order of the sessions court was to be set aside and the matter be remitted back to the lower court for trial (see para 7).

(3) The sessions judge erred when he awarded the plaintiff costs which was calculated on a solicitor-client basis. Costs for interlocutory proceedings were fixed pursuant to O 48 r 21 of the Subordinate Court Rules 1980 (see para 8). Further O 48 r 28 states that no costs for advocacy should be allowed where the plaintiff entered judgment under O 26A application (see para 9).

[**Bahasa Malaysia summary**

Plaintif merupakan pemilik berdaftar premis. Di bawah satu perjanjian sewaan bertulis di antara pihak-pihak, defendan sebagai penyewa telah berjanji untuk memohon dan mendapatkan dengan kosnya ditanggung sendiri kebenaran-kebenaran dan lesen-lesen yang diperlukan daripada pihak berkuasa yang berkenaan bagi tujuan untuk menjalankan operasi tempat letak kereta secara sah di premis berkenaan. Plaintif telah mendakwa bahawa defendan telah gagal untuk mendapatkan lesen yang diperlukan, dan telah meminta defendan untuk menghentikan operasi tempat letak kereta dan menyerahkan milikan premis kepada plaintif. Hakim mahkamah sesyen telah membenarkan penghakiman terus kepada plaintif dan memerintahkan defendan supaya menyerahkan milikan kosong premis tersebut kepada plaintif. Hakim mahkamah sesyen itu juga memerintahkan agar mesne profit dan kos dikira atas dasar peguamcara-klien. Defendan merayu.

Diputuskan, membenarkan rayuan defendan berkenaan dengan mesne profit dan kos atas dasar peguamcara-klien:

(1) Defendan telah gagal untuk mendapatkan lesen yang diperlukan untuk mengoperasikan tempat letak kereta. Oleh itu, defendan telah melanggar perjanjian bertulis. Defendan tidak mempunyai sebarang pembelaan terhadap tuntutan plaintif untuk mendapatkan milikan kosong premis tersebut (lihat perenggan 6).

(2) Hakim mahkamah sesyen tersebut tidak mengarahkan plaintif untuk membuktikan ganti rugi sebenar yang dihujah oleh plaintif telah dialami akibat daripada kemungkiran oleh defendan. Atas sebab ini, bahagian perintah mahkamah sesyen yang berkenaan perlu diketepikan dan perkara ini dihantar kembali ke mahkamah rendah untuk perbicaraan (lihat perenggan 7).

(3) Hakim mahkamah sesyen tersebut telah membuat kesilapan apabila beliau telah memberi award kos kepada plaintif yang dikira atas dasar peguamcara-klien. Kos bagi prosiding interlokutori adalah telah ditetapkan menurut A 48 k 21 Kaedah-Kaedah Mahkamah Rendah 1980 (lihat perenggan 8). Tambahan pula, A 48 k 28 menyatakan tiada kos bagi keguaman dibenarkan apabila plaintif memasuki penghakiman bagi permohonan di bawah A 26A (lihat perenggan 9).]

Notes

For cases on interlocutory proceedings, see 2(1) *Mallal' s Digest* (4th Ed, 2004 Reissue) paras 1781–1788.

For cases on summary possession of land generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3312–3337.

Legislation referred to

Subordinate Court Rules 1980 O 26A, O 48 rr 21, 28

Appeal from: Summons No 4–52–5165 of 2001 (Sessions Court, Kuala Lumpur)

Jagjit Singh (Jagjit Singh & Co) for the appellant.
S Nathan Balan (Paramjit Singh with him) (Zul Rafique & Partners) for the respondent.

Raus Sharif J:

[1] There are two appeals before this court involving the same parties and subject matter:

(i) R1–12–20 of 2003; and

(ii) R1–12–21 of 2003.

[2] It was agreed by the parties that this court is to hear R1–12–20 of 2003 and the decision of that appeal will bind R1–12–21 of 2003.

[3] In R1–12–20 of 2003, the appeal was by the defendant against the decision of the learned sessions court judge given on 17 January 2003 in allowing the plaintiff to enter a summary judgment under O 26A of the Subordinate Court Rules 1980. The learned sessions court judge ordered as follows:

(i) The defendant is to deliver vacant possession of the premise held under Title No 25287 Lot 166 and Title No 10483 Lot 167 known as s 57 Daerah Wilayah Persekutuan Bandar Kuala Lumpur (the said premise) to the plaintiff;

(ii) The defendant is to pay the plaintiff a sum of RM20,000 as mesne profits per month from 15 February 2001 until date of vacant possession;

(iii) The defendant is to pay a sum of RM160,000 as damages for breach of contract being double rental from the month of October 2000 to May 2001;

(iv) An indemnity from the defendant to the plaintiff against any claims and losses while the plaintiff may become liable in respect of the use of the premise by the defendant thereof; and

(v) Cost to be calculated on a solicitor-client basis.

[4] The facts of this case are as follows. The plaintiff is the registered proprietor of the said premise. Based on an oral agreement between the plaintiff and the defendant, the defendant operated a temporary public carpark on the said premise since 1990. The oral arrangement between the plaintiff and the defendant continued until 1998, whereupon the plaintiff and the defendant entered into a written tenancy agreement for one year for the purpose of operating the public carpark. In 1999, the plaintiff and the defendant entered a further tenancy agreement for a period of three years. Under the written tenancy agreement, the defendant covenanted to apply for and obtain at his costs all

the requisite approvals and licenses from the relevant authorities, for the purpose of lawfully operating the carpark.

[5] It was the plaintiff's case that the defendant had failed to obtain the required licence, and had been operating the carpark business without a licence. Hence by a letter dated on 4 July 2000, the plaintiff requested the defendant to stop the operation of the carpark and to hand over possession of the said premise to the plaintiff. The defendant failed to comply and on by a letter dated 31 January 2001 the plaintiff terminated the said agreement.

[6] Clearly in this case, the defendant had failed to obtain the required license to operate the carpark. Thus, the defendant was in breach of the said written agreement. Thus, to me the defendant has no defence to the plaintiff's claim of vacant possession of the said premise. Accordingly, I am in agreement with the decision of the learned sessions court judge, in ordering the defendant to deliver vacant possession of the said premise to the plaintiff.

[7] Nevertheless, I am unable to hold the same with regard to mesne profit and damages for breach of contract. Clearly, the calculation for the mesne profit and damage was very much in dispute. Moreover, the learned judge did not order the plaintiff to prove actual damages which the plaintiff alleged to have suffered as a result of the breach by the defendant. It is for that reason I ordered that part of the order of the learned session court judge be set aside and the matter be remitted back to the lower court for trial.

[8] I am also of the view that the learned sessions court judge erred in law when he awarded the plaintiff costs which was calculated on a solicitor – client basis. To me, costs for interlocutory proceedings are fixed pursuant to O 48 r 21 of the Subordinate Court Rule 1980 which reads:

> 21 In an interlocutory application the Court may allow a sum not exceeding $25 as costs:
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> Provided that the court, as it thinks just, in an interlocutory application involving question of law or fact, allow costs at an amount not exceeding $100.

[9] Further, O 48 r 28 clearly state that no costs for advocacy shall be allowed where the plaintiff enters judgment under O 26A application. Thus, that order of the learned judge in awarding the plaintiff costs on solicitor-client basis must be and hereby set aside.

[10] Accordingly, I allowed the defendant's appeal in R1–12–20 of 2003 in part as stated above with no order as to costs.

Order accordingly.

Reported by Loo Lai Mee